87-983

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.....

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

PETER SGRO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether using peremptory challenges to strike jurors on the basis of national origin deprives a defendant of his right to equal protection under the Fifth and Fourteenth Amendments and his right to a trial by jury under the Sixth Amendment of the United States Constitution?

2. Whether it is necessary to present evidence of the cognizability of a class when the class is composed of persons sharing a particular national origin?

3. Whether surnames are an acceptable method of determining national origin?

4. If evidence of cognizability is necessary, should the defendant,

in cases tried prior to Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712 (1986), be permitted the opportunity to present such evidence?

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, United States v. Sgro, 816

F.2d 30 (1st Cir. 1987). (Appendix A).

JURISDICTION

The jurisdiction of this Court to review the case on petition for writ of certiorari rests upon 28 U.S.C. §2254(1).

STATEMENT OF THE CASE

On January 6, 1984, an indictment was filed against the petitioner. Count I charged conspiracy to obstruct commerce by extortion in violation of 18 U.S.C. §1951. Count II charged obstruction of commerce by extortion in violation of 18 U.S.C. §§1951 and 1952. The petitioner was tried in front of a jury and a verdict of guilty on both counts was returned on December 18,

1985. The petitioner was sentenced to two consecutive two year terms.

The petitioner appealed to the First Circuit Court of Appeals. On April 17, 1987 the Court of Appeals issued a decision affirming the judgement of the District Court. (Appendix A). A petition for rehearing and en banc consideration was denied on June 17, 1987. (Appendix B).

FEDERAL CONSIDERATIONS

Equal Protection of Laws, Fifth and Fourteenth Amendment to the United States Constitution.

Right to trial by jury, Sixth Amendment of the United States Constitution.

Jury Selection and Service Act of 1968, 28 U.S.C. §§1861 et seq.

STATEMENT OF FACTS

A jury was empaneled on the first day of trial. During empanelment, defense counsel objected to the prosecutor's use of peremptory challenges to strike the only two Italian-surnamed jurors who had a possibility of sitting on the jury. Upon objection, the trial judge gave the prosecutor the chance to respond to the objection. The prosecutor made no denial of an attempt to exclude Italian surnamed jurors and gave no reason as to why these two jurors were challenged except "we're just merely trying to exercise our peremptory challenges within the discretion of the government, keeping

in mind the twelve jurors we would most like to see on this jury." The trial judge gave the prosecutor a chance for further response by inquiring if he was done. The prosecutor indicated that he was and offered no further comment or explanation. The trial judge overruled defense counsel's objection.

REASONS FOR GRANTING WRIT

1. This case involves important issues concerning the use of peremptory challenges and the extension of Batson v. Kentucky, 106 S.Ct. 1712 (1986), to challenges other than those based on race. This Court must determine if peremptory challenges based on national origin deprive a defendant of his right to

equal protection of the laws and to a trial by jury.

2. This case involves an important issue of whether evidence is required to show a cognizable group based on national origin. The requirement for such evidence is inappropriate when dealing with a suspect classification. Further, this requirement conflicts with the decisions of state courts of last resort.

3. The decision of the First Circuit Court of Appeals casts doubts on the use of surnames to determine national origin. This suggestion conflicts with decisions of this Court and other state courts.

4. This case involves important issues of the evidence necessary in all cases tried prior to Batson, but

pending on direct appeal at the time of the decision in Batson. The First Circuit opinion requires defendant to have foreseen Batson (as well as foreseeing the prosecutors use of peremptory challenges based on national origin) and to have presented evidence of cognizability. This is an unfair burden unless an opportunity is provided for a defendant to present such evidence on appeal or by remand for an evidentiary hearing.

ARGUMENT

The opinion of the First Circuit Court of Appeals dealt with, among other matters, the question of whether the petitioner was deprived of his right to equal protection of the laws and to a trial by jury as a

result of the prosecutor's use of his peremptory challenges to strike Italian-Americans from the jury. This argument was based upon the decision of the United States Supreme Court in Batson v. Kentucky, 476 U.S. --, 106 S.Ct. 1712 (1986), which was issued after the trial in the instant matter but while the case was pending on direct review. After briefing and argument in the instant case, but prior to the decision of the Court of Appeals, the United States Supreme Court ruled that Batson was to be applied retroactively to cases on direct appeal at the time of the Batson decision, even though Batson created a new rule which constituted a clear break with the past. Griffith v.

Kentucky, -- U.S --, 107 S.Ct. 708 (1986).

The Court of Appeals then reviewed the question raised by the petitioner and ruled that there was no evidence from which a trial court could have made a finding that Italian-Americans or people with Italian-American surnames constitute a cognizable group.

A. Striking jurors on the basis of national origin deprived the defendant of his right to equal protection of the laws under the Fifth and Fourteenth Amendment and his right to a trial by jury under the Sixth Amendment of the United States Constitution

Although Batson v. Kentucky, 476 U.S. --, 106 S.Ct. 1712 (1986) considered the question of striking

black jurors from a petit jury, there is nothing in the majority opinion to indicate that a different rule would apply to the exclusion of other groups protected under the Equal Protection Clause. Indeed, in a long line of cases this court has ruled that other cognizable groups cannot be excluded from jury venires. Thiel v. Southern Pacific, 328 U.S. 217 (1946) (daily wage earners); Hernandez v. Texas, 347 U.S. 475 (1954s) (Mexican-Americans); Taylor v. Louisiana, 419 U.S. 528 (1975) (women); Duren v. Missouri, 439 U.S. 528 (1979) (women). Batson, indeed cites Hernandez and Taylor among other decisions. Batson, 476 U.S. at --, 106 S.Ct. at 1716, ft. 5, 1717, fts. 6, 7, 8, 1718, 1722. Batson adopts the non-exclusionary

principles of these decisions and extends the means of proving such exclusion to examination of the prosecutor's peremptory challenges, holding that the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process." Avery v. Georgia, 345 U.S. 559 (1953). See also, Jury Selection and Service Act of 1968, 28 U.S.C. §§1861 et seq.

State courts have identified national origin as a cognizable group when reviewing the use of peremptory challenges under their own constitutions. People v. Wheeler, 22 Cal.3d 258 (1978); Commonwealth v. Soares, 377 Mass. 461 (1979), cert. denied, Massachusetts v. Soares, 444

U.S. 881 (1979); State v. Gillmore, 103 N.J. 508 (1986).

B. Evidence of cognizability was not necessary in the instant case.

The petitioner would argue that evidence of cognizability is not necessary where the cognizable group is based on national origin.

1. The Jury Selection and Service Act if 1968.

The Jury Selection and Service Act of 1968, 28 U.S.C. §§1861 et seq., makes it clear that a court can accept and, indeed, should accept, national origin as defining a cognizable group. The Jury Selection and Service Act prohibits discrimination "on account of race, color, religion, sex, national origin or economic status." 28 U.S.C. § 1862. (emphasis added). Several

courts have held that "[t]he test for a constitutionally selected jury is the same, whether challenged under the Fifth and Sixth amendments of the Constitution or under the Jury Selection and Service Act of 1968, 28 U.S.C. §§1861 et seq. United States v. Brady, 579 F.2d 1121, 1133 (9th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S.Ct. 849, 59 L. Ed.2d 41 (1979); Foster v. Sparks, 506 F.2d 805, 816-17 (5th Cir. 1975); United States v. Test, 550 F.2d 577, 584 (10th Cir. 1976); United States v. Smith, 463 F. Supp. 680, 681-82 (E.D. Wis. 1979)." United States v. Herbert, 698 F.2d 981, 984 (9th Cir. 1983). This would, of course, also apply to a jury challenged under the Equal Protection Clause. See, United States v. White Lance, 480 F. Supp.

920, 923 (D.S.D. 1979). See also, Commonwealth v. Soares, 377 Mass. 461 (1979), cert. denied, Massachusetts v. Soares, 444 U.S. 881 (1979).

2. Suspect classification.

In a case which came down after Batson, the Supreme Court of Colorado specifically addressed the question of whether Spanish surnamed persons constitute a cognizable group under both equal protection and sixth amendment analysis. Fields v. People, 732 P.2d 1145, 1153 (Colo. 1987). The Court noted that groups that are defined on the basis of race, national origin, and religion, suspect classifications triggering strict scrutiny under federal equal protection analysis, were the most readily identifiable cognizable groups. Id. at 1153, ft. 15. The

Court further went on to state "[i]n order to avoid an open-ended definition of cognizable groups that could require extensive hearings each time defense counsel could discern a pattern in the prosecution's exercise of peremptory challenges, we believe that a group is legally cognizable if it is defined on the basis of race, national origin, religion or sex." Id. at 1154, ft. 15. (In addition to the time that would be required for a hearing on the cognizability of a group based on national origin, trial courts would be required to grant defense counsel continuances to prepare for such hearings as it would be unreasonable for them to prepare for and have witnesses ready to testify without knowing whether or not a prosecutor was going to use his

or her peremptory challenges in a discriminatory fashion and what group would be discriminated against.)

Similarly, the Supreme Court of New Jersey has stated that "at minimum, cognizable groups include those defined on the basis of religious principles, race, color, ancestry, national origin and sex (all of which are suspect or semi-suspect classifications triggering strict or intermediate scrutiny under federal equal protection analysis). State v. Gillmore 103 N.J. 506, ft. 3 (1986). The clear import is that these attributes define cognizable classes, and that with no further evidence is necessary.

In Commonwealth v. Soares, 377 Mass. 461 (1979), cert. denied,

Massachusetts v. Soares, 444 U.S. 881 (1979), the Massachusetts Supreme Judicial Court adopted the state Equal Rights Amendment "as definitive in delineating those generic group affiliations which may not permissibly form the basis for juror exclusion: sex, race, color, creed or national origin." Id. at 488-499. Thus, the Court held, use of peremptory challenges to strike veniremen of "Italian descent from the jury would fall within this area of prohibited practice." Id. at 489, 490, n. 35.

Further, unlike the case of a small religious group or isolated community (see, State v. Nelson, 603 S.W.2d 158, 161-162 (Tenn. Cr. App. 1980)), the Court could have accepted Italian-Americans as a cognizable

group based on its own and widely held knowledge. Similarly, in Commonwealth v. Gagnon, 16 Mass. App. 110 (1983) (overturned on grounds of lack of objection at trial, Commonwealth v. Bourgeois, 391 Mass. 869 (1984)) the Massachusetts Appeals Court found French-Canadians to be a distinct group although no specific evidence had been entered at trial or on appeal.

C. The use of surnames to identify members of a cognizable group is proper.

The decision of the Court of Appeals also seems to indicate that evidence should have been presented on the issue of what surnames are Italian-American or on the relationship between surnames and ethnicity. The United States Supreme

Court has made it clear that a relationship between surnames and ethnicity should be presumed and that such evidence is not necessary. In Hernandez v. Texas, 347 U.S. 475 (1954), the United States Supreme Court expressly rejected the argument that Spanish surnames did not identify a definable segment of the population. "The State challenges any reliance on names as showing descent of persons in the County. However, just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class. Hernandez, at 480. Accord, Castaneda v. Partida, 430 U.S. at 486, ftn. 5, 495 (1977); People v. Trevino, 39 Cal.3d 667, 684-686 (1985). See also, Esquivel

v. McCotter, 791 F.2d 350 (5th Cir. 1987) (Allegations that Hispanics were challenged from the jury belied by record which showing no Spanish-surnamed jurors were challenged except for cause).

D. The requirement of evidence of cognizability places an insurmountable burden on petitioners in cases tried before the issuance of Batson.

Even if evidence of the cognizability of groups based upon national origin is to be required, it is unfair to require the defendant to have introduced such evidence in cases which were tried prior to Batson. The United States Supreme Court indicated that Batson was a clear break with the past. Griffith, supra. Although defense counsel was

foresighted enough to make an objection in the instant case, it is unreasonable to expect him to have come to trial armed with evidence on the cognizability of this group when the then-existing case law did not allow him to challenge the use of peremptory challenges in a single case, even on the basis of race, religion, national origin or another already accepted cognizable group.

In such a case, where there has been a timely objection and a record was made, and the objection was not overruled based on lack of cognizability, specific evidence of cognizability cannot be required.

Further, it is unfair to require evidence of cognizability not required by the trial court. The District Court Judge's ruling was not

based on the lack of evidence of cognizability. While the Court asked the prosecution to explain its challenges, it did not ask the petitioner to justify his contention that a cognizable group was in question. Further, the court made references to whether particular jurors were of Italian descent, indicating, perhaps, a question of identification of the group, but accepting the concept of national origin as a distinguishing factor.

Where the District Court made no request for evidence of cognizability, where there was no indication at all that the objection was being overruled for lack of such evidence and where there is, indeed, an implication that cognizability was accepted, it is unfair to decide the

question on appeal based on lack of such evidence. (See United States v. Test, 550 F.2d 577,585 (10th Cir. 1976) (where the district court assumed Chicanos were a cognizable class and in the absence of specific findings by the district court, the Court of Appeals would proceed on the same assumption).

If such evidence is finally deemed to be necessary, the defendant must have an opportunity to present it at some point in the proceedings. This is consistent with the practice that has developed after Batson of remanding cases to the trial court to allow the prosecutors to give reasons for their peremptory challenges. United States v. Chalon, 812 F.2d 1302 (10th Cir. 1987); United States v. Leslie 813 F.2d 658 (5th Cir.

1987); Garza v. Texas, 725 S.W.2d 482 (Tex. Crim. App. 1987); People v. Bolden, 152 Ill.App.3d 631 (Ill. App. Ct. 1987); People v. Howard, 513 N.Y.S.2d 507 (1987). To deny the defendant this right would allow convictions by juries selected in violation of the Constitution.

CONCLUSION

For the above stated reasons the petitioner requests that this application for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

TORRUELLA, Circuit Judge. This is the second installment of a matter which has previously been before us in another form. United States v. Crooks, 776 F.2d 7 (1st Cir. 1985). The appeal presents two issues: (1) whether the Government exercised its peremptory challenges in violation of the rule established in Batson v. Kentucky, 476 U.S. _____, 106 S. Ct. 1712 (1986), and (2) whether remarks attributed to the prosecution deprived defendant of a fair trial. We respond in the negative to both questions and thus affirm defendant's conviction.

Defendant was charged on January 6, 1984 in a two count indictment alleging conspiracy to obstruct commerce by extortion in violation of 18 U.S.C. § 1951, and obstruction of

commerce by extortion in violation of U.S.C. §§ 1951 and 1952. It was claimed that defendant by the use of threats and violence, and conspiring with two codefendants, induced one Albert Ferguson to cease rendering services as disk jockey to Daisy's Restaurant, forcing him instead to provide his apparently much-sought after services only to the Cafe Mews. The scene of the crime was North Conway, New Hampshire, where both establishments are engaged in interstate commerce.

Defendant was tried before a jury, convicted and sentenced to consecutive two-year terms on each count.

The challenge to the peremptory challenges

In Batson, the Supreme Court ruled that a defendant in a state criminal trial could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment based on the prosecution's use of peremptory challenges to strike members of defendant's race from the jury venire. Defendant seeks to further open the door left ajar in Batson.

In the present case defendant, who claims to be an "Italian-American," alleges that the government violated Batson because it peremptorily challenged "the only two Italian-surnamed jurors" on the venire,[1] thus attempting on impermissible grounds "to exclude

Italian-Americans, a cognizable group in the community of which defendant is a member."

As first line of defense the government raises the non-retroactivity of Batson. Batson was decided after this case was tried and while this appeal was pending. Although the retroactivity of Batson may nave been an open question when this appeal was argued, the matter has since been definitively decided by the Supreme Court in Griffith v. Kentucky, ___ U.S.____, 55 U.S.L.W. 4089 (decided January 13, 1987), in which it was ruled that Batson was applicable 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break'

with the past." 55 U.S.L.W. at 4092. This is such a case and thus we are required to apply Batson retroactively to this appeal.

The government fares better on the merits of the Batson issue, however. For a defendant to establish a prima facie case of purposeful discrimination in the selection of the petit jury, based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, the defendant first must show that he is a member of a cognizable racial group. Batson, 106 S. Ct. at 1722-1723; Castaneda v. Partida, 430 U.S. 482, 492 (1977). Appellant-defendant has failed to meet his burden in this respect. We assume without deciding that the

principles of Batson would extend to ethnic as well as racial constituencies. On this assumption, the standard that must be met to establish that a group is constitutionally cognizable is no longer subject to question. See, Buren v. Missouri, 439 U.S. 357, 364 (1979); Barber v. Ponte, 772 F. 2d 982, 997 (1st Cir. 1985) (en banc). The proponent must prove that (1) the group must be definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences must run through the group, and (3) there must exist a community of interests among the members, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.

Other than general statements to the effect that "[c]ommon experience dictates that Italian-Americans are a distinctive ethnic group" and, that [t]he members of this ethnic group certainly have common ideas, attitudes and experience," the record is singularly bare of any evidence from which such findings could have been reached by the trial court.

Appellant did not request an evidentiary hearing on the issue of cognizability. Neither did he make an offer of proof as to facts tending to show prima facie the presence of a cognizable group. Furthermore, he offered no evidence showing what surnames are "Italian-American" or demonstrating the relationship between surnames and ethnicity. Appellant's conclusory allegations

are insufficient to satisfy the burden of proving cognizability. We will not endorse such a practice. At the very least, a party seeking to invoke Batson must sketch out a fact-based prima facie showing of cognizability in the Duren sense.

Sgro entirely failed to carry even this minimal burden. There was not a scintilla of evidence suggested to, or placed before, the district judge to show that the undefined designation "persons bearing Italian-American surnames," or even the designation "Italian-American" meets the test promulgated by Duren and Barber to establish a constitutionally cognizable class.[2]

No further inquiry is thus required on this issue.

The prosecutor's remarks and questions

Defendant seeks reversal of his conviction because of perceived prosecutorial misconduct related to allegedly inflammatory interrogation during trial. To grant such a remedy we must conclude that the misconduct, assuming it is such in this case, was likely to have affected the trial's outcome, or that the sanction requested is needed to deter future prosecutorial misconduct. United States v. Capone, 683 F.2d 582, 585-586 (1st Cir. 1982). To determine whether either of these two conclusions are warranted, we must examine the content of the improper remarks, the severity of the misconduct, whether it was deliberate or accidental, whether curative

instructions were given and their likely effect, and the strength of the evidence again defendants. Id.

Two separate incidents are involved. In the first, during the interrogation of Deborah Kneeland, the government was refreshing her memory with prior grand jury testimony. The following colloquy ensued:

> Q - [Mr. Miller] - That was the same big guys that were standing around the table; is that correct?
>
> A - [Mrs. Kneeland] - Yes.
>
> Q - Standing around the table while Peter was seated; isn't that correct?
>
> A - Possibly. I don't know.
>
> Q - How would you characterize these big men?
>
> Mr. Witkin - Objection, your Honor please, to characterization.

> Tne Court - Well, why don't you be a little more specific. You're allowed to lead.
>
> Q - Would it be unfair to characterize them as a kind of musclemen?
>
> Mr. Witkin - Objection.

The Court went further, however, and ruled the prosecutor in contempt.[3] The Court denied a motion for mistrial, but gave a cautionary instruction to the jury directing it to disregard the term "Musclemen."[4]

This ruling has as a background a motion in limine filed by defense counsel prior to trial in which the defendant sought a prohibition against attempts by the prosecutor to imply that defendant was connected to organized crime. At the Crooks trial, involving appellant's co-defendants, the prosecutor had used words such as "musclemen" and

"enforcers." In this case the district court ruled in favor of defendant's motion in limine and admonished the prosecutor from using such terms directly, or indirectly through the witnesses.

Although the district court's ruling is not at issue, our decision in Crooks does not hold, as appellant implies in his brief, that the use of the term "musclemen" is per se improper. Crooks, 766 F.2d at 12. Thus, although the district court is perfectly correct in requiring compliance by the prosecutor with its rulings, a violation of such a ruling by the prosecutor, although appropriately the basis for sanctions individually against such prosecutor, does not necessarily dictate reversal or the ordering of a new trial if

such conduct does not independently affect the integrity of the judicial proceeding vis-a-vis defendant's rights.

In this case, the isolated use of the term "musclemen", one occasion during the middle of a trial that commenced on December 9, 1985 and terminated on December 18, 1985, can hardly be called a momentous happening. The term "musclemen" has no racial or ethnic implication on its face but rather relates to a method of operation relevant to the crimes charged, and was fairly used in the light of the proof presented.[5] It is no more improper to use this terminology when dealing with a case of extortion than to use "robber" or "gunman" when dealing with the crime of armed robbery.

Furthermore, the circumstances under which the term was used, although clearly in violation of the district court's in limine ruling, do not appear to be the product of a deliberate attempt to cause prejudice to defendant, but rather the result of the examination of a witness who was less than cooperative. Additionally, the fact that immediate curative instructions were given by the trial court, instructions which none of the parties deemed inadequate on their face, appear to use to have cured any possible prejudice to defendant, even assuming the remark was per se improper. Last, but not least, this statement, when considered within the totality of the evidence presented against the appellant, had an insignificant

impact in deciding the outcome of his case before the jury.

We will presently outline this evidence in considering the second incident as to which appellant claims prosecutorial misconduct: the interrogation of Olga Hall, a defense character witness. On cross-examination, she stated that she had learned of the charges against the defendant in August, 1985, a statement she reaffirmed on redirect examination. On recross examination, she stated that she had learned about the charges from the defendant in person. The government then asked whether she was aware that the F.B.I., was looking for the defendant. Counsel for defendant objected. Again, the Court gave a

cautionary instruction unobjected to by either party.

Appellant claims that this interrogation was improper because it raised the "specter of flight and consciousness of guilt without any foundation or real evidence as to flight." The district court had previously asked the prosecution whether there would be evidence of flight and was told that no such evidence would be introduced. The defense moved for a mistrial when the question was asked, but instead the court gave a limiting instruction.

The prosecution could have, had it chosen to, presented direct evidence of flight as proof of consciousness of guilt. See United States v. Ritch, 583 F.2d 1179, 1181 (1st. Cir.), cert. denied, 439 U.S.

970 (1978). The government did not, however. And, assuming the validity of the limiting instruction, the issue remains whether in the context of the trial, the totality of the evidence, the particular circumstance of this incident, and the trial court's instruction, the defendant's rights were prejudiced to such an extent as to have changed the outcome of the trial. Again the answer to all these questions is in the negative.

The evidence against appellant was overwhelming, making this "incident" as unimportant in the final outcome as was the other claim of prosecutorial misconduct.

Several witnesses testified that they saw and heard Sgro threatening Albert Ferguson to get him to stop

providing disk jockey services to Daisy's and provide them only to Cafe Mews. Ferguson testified that Sgro threatened to "smash the lounge" (Daisy's), destroy Ferguson's equipment and hurt him if he did not do as told. His wife, Kristin, corroborated these threats. The most damning evidence was testimony about a meeting between Ferguson, his wife, the owner of Cafe News, Sgro, and four men Sgro claimed to have paid $20,000 to carry out the earlier threats.

During that meeting, which was observed by one of Ferguson's assistants and a waitress from Cafe Mews, one of Sgro's men threw a glass at Kristin Ferguson, cutting her and breaking a tooth. A doctor testified that her injuries were consistent

with her testimony. After she was brought to the hospital, Sgro told Ferguson his wife was lucky that was all she got. Sgro then engaged in a dialogue with another of his men. Sgro asked: "If I tell you to break his arm, will you break his arm? Will you break his fingers? Or if I told you to shoot him, would you shoot him." The men kept responding, "Yes, I would." In response to these and other threats made during the over two hour meeting, Ferguson stopped working at Daisy's. In the light of this evidence, claims that the alleged prosecutorial misconduct had any effect on the outcome of Sgro's conviction are spurious.

In view of the above judgment of the district court is affirmed.

FOOTNOTES

[1] The two names in question are Joan Catano and Marco Fiore. No evidence was presented regarding the enthnicity of these names, at least one of which could very well be Hispanic.

[2] The unsatisfactory vagueness of the record is highlighted by the fact that there is nothing which in any way indicates that the appellant-defendant's name, Sgro, hardly one in common usages, is "Italian-American."

[3] The record does not indicate if a hearing was held or the prosecutor punished as a result of this ruling.

[4] The instruction is not reproduced in the appendices by either party to this appeal. We therefore assume that its content was appropriate.

[5] Webster's Third New International Dictionary, p. 1489: "a man hired (as by a gangster) to enforce compliance by strong - arm methods: GOON, ENFORCER."